1994

JOHN COREY JENSEN, Plaintiff and Appellant vs. PHILLIPS PETROLEUM COMPANY, A DELAWARE CORP., Appellant's Reply Brief

Utah Court of Appeals

Glen A. Cook; Cook & Lawrence; Attorneys for Appellant.
Donald L. Dalton; Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

JOHN COREY JENSEN,	:	APPELLANT'S REPLY BRIEF
Plaintiff/Appellant	:	
vs.	:	Case No. 940280
PHILLIPS PETROLEUM COMPANY, A DELAWARE CORP.,	:	Priority No. 15

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,
DAVIS COUNTY, JUDGE PAGE

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ARGUMENTS

I. PLAINTIFF PRESERVED HIS OBJECTION TO INSTRUCTION NO. 19

Defendant Phillips concedes that Plaintiff requested an instruction based on Canfield v. Albertson's, Inc., 841 P.2d 1224 (Utah App. 1992)(Appellee brief at 5). Defendant is incorrect that Plaintiff dropped (or appeared to drop) that request for instruction. Mr. Jensen actually objected to Instruction No. 19 on two bases:

> MR. COOK: Your Honor, this, and in another instruction I will refer to, the Court has used these instructions, neither of which were propounded by counsel regarding business invitee. The business invitee distinction has been abolished in Utah by higher courts, it rather is a comparative standard that is now used.
>
> Additionally, Instruction 19 states that if the owner has knowledge of such danger, et cetera -- well, under Canfield when evidence is presented or the theory of the case is that the owner took reasonable precautions for expectable acts of third parties would create a dangerous condition, actual knowledge is not required, and we have a copy of Canfield stating that actual knowledge is not required, it is presumed.
>
> In this case, we had expectable acts of third parties and conditions created by the defendant...Actual knowledge is not required. [Emphasis added].
>
> Transcript at 108-109, included in Appendix H.

Thus, it is clear from the record that Instruction 19 was objected to by Mr. Jensen on two bases: The business invitee distinction and, secondly, the actual knowledge issue.

Phillips is clearly not correct in arguing that "reasonable care was the only relevant consideration" and that Mr.

Jensen "voiced no objection to the foregoing" instruction. (Appellee Brief at 7). This ignores the entire colloquy on pages 108-112 of the transcript, as noted above and also set out in Appendix A to this brief.

Utah law requires that "an objection to an instruction must be sufficient and precise to alert the trial court to all claimed error and to give the judge an opportunity to make any corrections deemed necessary." Nielsen v. Pioneer Valley Hospital, 830 P.2d 270, 271 (Utah 1992). Clearly, given the discussion in which Mr. Jensen repeatedly objected to the actual notice requirement, the trial court was aware that Mr. Jensen wished a Canfield instruction regarding knowledge. This is the same argument made on appeal.

Indeed, Phillips admits on page 7 of its brief that:

> Plaintiff countered with an instruction based on Canfield v. Albertson's, Inc., 841 P.2d at 1226, dispensing with the notice requirement in cases where the "store owner, its agents, or employees create or are responsible for the dangerous condition." The trial court refused to give the defendant's notice instruction.

For Phillips to argue that the objection was not preserved belies the transcript in the trial court and its own appellate brief.

II. BECAUSE DEFENDANT ARGUED NOTICE A CANFIELD INSTRUCTION WAS NECESSARY

Phillips states that the trial court "viewed this as a case where the property owner could not possibly contest notice, since

it was the one who created the hazardous condition (assuming there was one). The trial court's decision not to give the notice instruction is not at issue." Appellee's brief at 10.

Mr. Jensen begs to differ. Defense counsel argued that the Phillips employee on duty, Paul Hatch, had no notice of the problem. (T. 124, line 6-12):

> There is nothing for Paul [Hatch] to do in this situation because he didn't know there was a problem. ...[Mr. Jensen] didn't report the situation. ...How can we correct something if we didn't know about it?

The purpose of Canfield was to remove this requirement of knowledge argued by defense counsel, i.e., "to relieve the Plaintiff of the requirement of proving actual or constructive notice in such instances as to effect more equatable balance in regard to the burdens of proof." Canfield at 227 (Citations omitted).

This case is no different from Canfield.

Regarding Canfield v. Albertson's, Phillips notes in its brief that "Albertson's attempted to defend by arguing that it had no notice of the specific lettuce leaf upon which plaintiff slipped and fell." Appellant brief at 11. This is precisely what occurred in this case: Phillips attempted to argue that it had no notice of the conditions upon which plaintiff slipped and fell. (T.124, line 6-12).

In its brief, Phillips states "Plaintiff agrees that the trial

court's instruction on reasonable care was correct..." (Appellee's brief 11). This is not true. Jensen agreed that the standard was one of reasonable care. He did not agree that the instruction was correct. As admitted by Phillips in its brief (page 7), Mr. Jensen asked for a Canfield instruction on the issue of knowledge. Thus, Phillips' implication that plaintiff wanted only the reasonable care instruction is contradicted by its own brief and the transcript at 108-109.

III. FAILURE TO GIVE THE INSTRUCTION WAS HARMFUL ERROR BECAUSE DEFENSE COUNSEL ARGUED NOTICE AND KNOWLEDGE

Jensen alleges that the "jury was never told that notice was an issue." (Appellants brief at 11). This is not true. Phillips repeatedly argued notice in this situation:

> There was nothing for Paul [Hatch] to do in this situation because he didn't feel there was a problem. ...We didn't know. How can we correct something if we didn't know about it?
>
> (T. 124, line 6-12).

For Phillips to state that notice was not argued at the trial level is incorrect.

IV. THE TRIAL COURT'S AWARD OF COSTS IN EXCESS OF THAT ALLOWED BY STATUTE WAS AN ABUSE OF DISCRETION

Phillips seeks to be paid for the deposition "appearance fee" paid to the expert witness. However, as noted in Frampton v. Wilson, 605 P.2d 771 (Utah 1980), where the expert witnesses were

also paid in excess of the subpoena rate:

> There is a distinction to be understood between legitimate and taxable "costs" and other "expenses," of litigation which may be ever so necessary, but are not properly taxable as costs. Consistent with that distinction, the courts hold that expert witnesses cannot be awarded extra compensation unless the statute expressly provides.
>
> Frampton at 774.

No statute authorizes this expense for the expert witness to be included in the judgment. While URCP 26(b)(4)(C) allows a reasonable fee for time spent in responding to discovery, Phillips has failed to note any statute which authorizes this fee to be included in the taxable costs. The "Utah Supreme Court has defined costs to mean those fees which are required to be paid to the court and to witnesses, AND for which the statutes authorize to be included in the judgment." Morgan, citing Frampton, at 774 (emphasis added). It is a two part test: Not only must the fees be required, but the statute must authorize them to be included in the judgment. The statute does not authorize Dr. Paulos' expert fee to be included in the judgment.

CONCLUSION

Plaintiff preserved his objection to Instruction No. 19 in his request for a Canfield instruction. Any error was not harmless, as notice was an issue and argued by Phillips. The trial court abused its discretion in awarding the deposition appearance fee inasmuch as no statute authorizes payment of that fee.

DATED this 9 day of September, 1994.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing APPELLANT'S REPLY BRIEF to the following on this 9 day of September, 1994:

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VI. APPENDIX

A. PAGES 108-112 OF TRIAL TRANSCRIPT

B. PAGE 124 OF TRIAL TRANSCRIPT

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Mr. Cook, have you had occasion to look at those?

MR. COOK: I have, your Honor.

THE COURT: Have you, Mr. Dalton?

MR. DALTON: I have, your Honor.

THE COURT: The procedure that we'll follow, I have numbered the proposed jury instructions. The first thing we would like to talk about is the exceptions to those instructions, and I would like you to do that by referring to the number and any comments that you have on them, referring to any case law, Mr. Cook, and then you the same thing, Mr. Dalton, and then we will talk about exceptions to the Court's failure to give your proposed jury instructions. So let's start with you, Mr. Cook.

MR. COOK: Thank you, your Honor. Can we turn to Instruction No. 19?

THE COURT: All right.

MR. COOK: Your Honor, this, and in another instruction I will refer to, the Court has used these instructions, neither of which were propounded by counsel regarding business invitee. The business invitee distinction has been abolished in Utah by higher courts, it rather is as a comparative standard that is now used.

Additionally, Instruction 19 states that if the owner has a knowledge of such danger, et cetera -- well, under Canfield, when evidence is presented or the theory of

THE COURT: I don't think that's the case, except in the case of tenant and landlord and that's as far as that distinction goes. It does not extend beyond tenant and landlord. There is a tenant and landlord case that essentially distinguishes and abolishes that distinction, but it does not extend to the business invitees nor does it extend to the trespassers.

MR. COOK: Okay.

MR. DALTON: I would like to speak to 20. In fact, that is an instruction I requested. I think that's required under that Deats vs. Commercial Security Bank building that I referred to the Court. So I am happy with 20 and 21.

THE COURT: I will note your objection. I will give you a chance to look and see what you can give me as far as case law. If the only case law you have is the one dealing with landlord and tenant, that I'm not interested in.

MR. COOK: Okay.

THE COURT: Because it didn't do that.

MR. COOK: Instruction No. 27 appears, your Honor, to be a Biswell instruction, and I note the copies you gave us are the ones without citations on them.

THE COURT: That's the one out of MUJI.

MR. COOK: We would encourage the Court either to use our Biswell instruction, which actually I thought I had

back out, salt that spot right there, take a shovel, break it up, put it down the drain. Five, ten minutes, he is on his way again, no problem. Again, it's not our fault if he didn't do that. We can't be there every second to watch over what he's doing. We are not babysitters. The fact is, he didn't move the truck, he didn't go for help, and there was nothing for Paul to do in this situation because he didn't know there was a problem. You see, even after Mr. Jensen injured himself, he didn't go to Paul. He didn't report the situation. He didn't come and tell us, "Look, you have got a problem over there." He loaded up, called the dispatcher to say he was done, went on his way. We didn't know.

How can we correct something if we didn't know about it? It's his responsibility to come tell us if there is a problem. Somebody else might encounter it. You would think if there had been a big problem, he would have told us, even after the fact. Now, that's assuming that there was a problem, because you have heard testimony from people who were in that bay that very morning that they didn't even consider it a problem. Paul Hatch was one of them. He stood in the very place that Mr. Jensen said he slipped and he ran the manual meter reading on the pump there and he doesn't remember having a problem.

Now, of course he is there every day or he works there, but you also heard the proffer, the testimony by